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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ANDREA ESQUIVEL, et al., Plaintiffs, vs. SAN FRANCISCO UNIFIED SCHOOL DISTRICT, et al., Defendants.	No.: CV 07 5709 MHP **DEFENDANTS' REPLY TO UNTIMELY OPPOSITION** Hearing: Date: April 21, 2008 Time: 2:00 p.m. Crtrm.: 15 (The Honorable Marilyn H. Patel)

On April 8, 2008, plaintiffs filed their opposition brief to defendants' motion to dismiss and also filed an "addendum" to that brief. These briefs were untimely, having been filed more than a week after they were due.[1] Moreover, because plaintiffs did not file and serve them electronically as required, defendants' counsel did not receive them until April 10.

In light of plaintiffs' failure to file a timely opposition, defendants requested the Court to consider deciding the case on the papers without a hearing, and they renew that request here based on the fact that plaintiffs' untimely opposition offers absolutely no legal support for their case.

Plaintiffs may be disappointed that the San Francisco Board of Education is discontinuing the JROTC program, but that disappointment does not give rise to a legal basis for challenging the Board's duly-made policy decision.

Plaintiffs would have the Court decide the nonjusticiable question of what type of curriculum San Francisco's public schools should offer. That task would have no judicially-manageable standards, would be unsupported by any case law of which defendants are aware, and would be contrary to the United States Supreme Court's repeated warning that courts should avoid wading into such matters.

A review of the opposition briefs makes two things clear. First, in their long discussion about the benefits of the JROTC program, plaintiffs simply underscore the point that this case is about policy choices best left to elected officials, rather than a dispute of constitutional dimension that can be resolved by courts through recognized judicial standards.

Second, as with their previous filings, plaintiffs do not point to any case law that supports their position that the First Amendment requires or permits a court to review a school district's curriculum decisions or compels a school district to continue offering a particular program that they chose, in their discretion, to offer in the first place. All of the cases cited in plaintiffs' brief are either irrelevant or inapposite. They are: (1) *West Virginia Bd. of Educ. v. Barnette* (1943) 319

[1] The opposition brief was due March 31.

U.S. 624, which famously prohibited schools from compelling students to salute the flag but had nothing to do with government speech or curriculum decisions; (2) *Stanley v. Georgia* (1969) 394 U.S. 557, which dealt with the private right to receive obscene material without committing a crime but had nothing to do with schools or a school district's authority to implement curriculum choices; (3) *Griswold v. Connecticut* (1965) 381 U.S. 479, which of course established the right of privacy to use contraceptives without government interference but had nothing to do with schools or a school district's authority to implement curriculum choices; (4) *Board of Educ. v. Pico* (1982) 457 U.S. 853, which, as discussed in the motion to dismiss at pages 16-17, addressed the unique context of the school library and expressly declined to extend its holding to curriculum decisions; and (5) *Ambach v. Norwick* (1979) 441 U.S. 68, a case about the equal protection clause, not the First Amendment, which found that a New York law barring noncitizens from teaching public schools did not violate the equal protection clause.

Finally, plaintiffs take issue with defendants' reliance on *Rosenberger v. Rector and Visitors of the Univ. of Va.* (1995) 515 U.S. 819, but that case is fatal to plaintiffs' claim. There, the Court said this:

> When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.
>
> 515 U.S. at 833.

Although the Court went on to find that the University could not make viewpoint-based restrictions when it does not speak itself but "instead expends funds to encourage a diversity of views from private speakers" (*id.* at 834), this case involves the Board of Education's speech in the form of curriculum decisions, and it does not involve a limited public forum open to private speakers. *Rosenberger* controls the outcome here.

Plaintiffs' case is frivolous and should be dismissed.

Dated: April 16, 2008

Respectfully submitted,

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